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5 ATTORNEYS FOR Debtor

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7  
8 UNITED STATES BANKRUPTCY COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 In re: ) Case No. 13-53491  
12 272 E SANTA CLARA GROCERY, LLC, ) CHAPTER 11  
13 Debtor. ) **DECLARATION OF ANDREW A.**  
14 ) **LEWIS**  
15 )  
16 )  
17 )  
18 )

19 I, Andrew A. Lewis, do hereby declare:

20 1. I am the manager of Debtor 272 E SANTA CLARA GROCERY, LLC ("Debtor") and the  
21 court appointed responsible person for the Debtor. I am also the one of the Investors as that  
22 term is described below and the principal and president of Investment Grade Loans, Inc.  
23 ("IGL") as referenced hereinafter. I am, and at all times herein referenced herein was, over  
24 the age of eighteen. I am authorized to make this declaration on behalf of IGL and Debtor.  
25 2. I submit this declaration as part of Debtor's AMENDED OBJECTION TO PROOF  
26 OF CLAIM OF BOSTON PRIVATE BANK & TRUST COMPANY (Claim No. 2)  
27 ("Objection") and of my own personal knowledge and such personal knowledge is based on  
28 my personal involvement in a loan to Kimomex Santa Clara, LLC ("Kimomex") by various

1 investors of IGL and brokered and serviced by IGL, foreclosure of the associated deed of  
2 trust with Kimomex relative to real property commonly known as 272 E. Santa Clara Street,  
3 San Jose, California ("the Property"), IGL's and Debtor's transactions and dealings with  
4 Boston Private Bank & Trust Company, formerly Borel Bank & Trust Company ("BPB")  
5 relative to BPB's loan and deed of trust to Kimomex relative to the Property, BPB's notice of  
6 default and notice of trustee's sale relative to BPB's loan and deed of trust to Kimomex  
7 relative to the Property, payments to BPB relative to BPB's loan to Kimomex, the  
8 foreclosure by IGL of the deed of trust associated with the Property, creation of Debtor,  
9 transfer of interests in the Property from IGL's investors to Debtor, Debtor's efforts to secure  
10 a tenant for the Property, Debtor's efforts to sell The Property, the bankruptcy of Debtor, the  
11 sale of the Property, and Debtor's tax returns. In this regard, I was and am readily familiar  
12 with process by which IGL and Debtor maintained its files, books, and records, with IGL's  
13 and Debtor's files, books, and records and IGL's files, books and records as they relate to  
14 each of the above-listed areas, know the documents attached hereto were placed into the  
15 files, books, and records of IGL and Debtor at or near the time they were received or  
16 generated, and became part of the files, books, and records IGL and Debtor consistent with  
17 the regularly business activities of IGL and Debtor.

18 3. Only true and correct copies of the referenced exhibits are attached hereto. Except as  
19 noted herein the referenced exhibits are from IGL's and Debtor's files, books, and records. I  
20 understand the attached exhibits are also listed exhibits in Debtor's Trial Exhibit List and  
21 therefore this declaration references and uses those exhibit letters/numbers.

22 4. IGL's business was and is, as its name indicates, providing investors with investment  
23 grade loans. My general duties at IGL include, but are not limited to, handling and/or  
24 overseeing all aspects of the business including loan originations, overseeing accounting,  
25 executing operating agreements for new business deals, approving loan documents including  
26 promissory notes, deeds of trust, and related documents, approving lender documents for  
27 IGL's investors, including disclosures, loan servicing, and tax returns for IGL and entities  
28 used for various business deals. I also communicate with IGL's borrowers and IGL's

1 investors. My duties at IGL included various similar actions on behalf of the Debtor and  
2 included working with IGL's former Chief Financial Officer Thomas Rancatore with various  
3 bankruptcy filings and other matters. During my employment at IGL and relative to work for  
4 the Debtor, Thomas Rancatore and other employees of IGL generally reported to, took  
5 direction from, and assisted me.

6 5. In May 2009, several investors (collectively the "Investors") loaned \$635,000 to  
7 Kimomex Santa Clara, LLC ("Kimomex") secured by a deed of trust in second position  
8 ("Second DOT") against the Property with Investment Grade Loans, Inc. ("IGL") as trustee.  
9 The Second DOT was subject to an existing first deed of trust in the amount of  
10 approximately \$3.6 million dollars recorded in July 2008 in favor of Boston Private Bank &  
11 Trust Company ("BPB") (formerly known as Borel Private Bank & Trust Company) (the  
12 "First DOT"). The Property consisted of 1.4 acres improved with a commercial building of  
13 approximately 26,575 square feet originally built in 1966 which was occupied by tenant  
14 Kimomex Markets, Inc. which operated a Mexican grocery store business.

15 6. In approximately May 2009 and prior to execution of the IGL Note and Second  
16 Deed of Trust IGL prepared an Investment Overview for IGL's analysis and for the  
17 Investor's benefit based on information provided to and made available to IGL. I approved  
18 and signed the Investment Overview because at the time I believed that the information  
19 contained therein was true and accurate. As I recall the information contained therein came  
20 from several sources, including one of the principals of Kimomex, an appraisal of the  
21 property as indicated therein, and my own investigation. I do not believe that at that time IGL  
22 had a copy of BPB's Loan or the First DOT or that those documents were a source of the  
23 information contained in the Investment Overview. The Investment Overview notes certain  
24 information which IGL and the Investors may consider before proceeding with the business  
25 opportunity, including our understanding of the prior encumbrance. The Investment  
26 Overview notes, under "Prior Encumbrances" that Kimomex's monthly payment to BPB  
27 under BPB's loan to Kimomex and First DOT was \$24,307.00, the interest rate was 6.5%,  
28 the present balance was \$3,555,168.55. The "Equity Analysis", Disclosure Statement

1 Summary, Part 9 Encumbrance Information, and Part 10 Loan to Value Ratio sections of the  
2 Investment Overview also note the present balanced owed by Kimomex to BPB was  
3 \$3,555,168.55). See Debtor's Trial Exhibit A.

4 8. The Mexican grocery store business failed and Kimomex entered into protracted  
5 negotiations with a potential new grocery store tenant, i.e. Fresh & Easy, but that deal was  
6 never consummated.

7 9. In approximately June 2011 IGL recorded a notice of default under the Second DOT  
8 because Kimomex defaulted on the IGL Note.

9 10. In approximately June 2011, IGL received a copy of a Notice of Trustee's  
10 Sale whereby BPB, through its trustee Lender Services, Inc. (PLM Lender") gave notice of  
11 its intent to foreclose on the First DOT. The Notice of Trustee's Sale is dated June 23, 2011  
12 and provides that the unpaid balance and other charges was estimated at \$3,868,163.06. See  
13 Debtor's Trial Exhibit C.

14 11. On June 30, 2011, prior to the Foreclosure Agreement described below, IGL was  
15 provided a reinstatement letter dated June 29, 2011 by PLM Lender Services, Inc. ("PLM"),  
16 trustee of the First DOT, which indicated, in part, the amounts necessary to reinstate the loan  
17 through July 15, 2011 at \$386,080.68 (delinquent payments of \$340,304.30 and  
18 miscellaneous fees) and specified a principal balance of \$3,487,501.16. See Debtor's Trial  
19 Exhibit D.

20 12. I negotiated the reinstatement and cure amount of \$380,661.90 directly with Bruce  
21 Brown of BPB and based those negotiations on many factors, including the asserted principal  
22 balance of \$3,487,501.16, that the regular monthly was \$24,307.45, that the regular monthly  
23 payment consisted of principal and interest at 6.5%, that the regular monthly payment of  
24 \$24,307.45 would keep the loan current, and without knowledge of any environmental issues  
25 with the Property. IGL would not have foreclosed on its Second DOT, entered into the  
26 Foreclosure Agreement on behalf of IGL, paid the agreed reinstatement and cure monies of  
27 \$380,661.90 or paid the regular monthly payments of \$24,307.45 to keep the loan current had  
28 the principal balance not been \$3,487,501.16, had the payment of \$380,661.90 and the

1 regular monthly payment of \$24,307.45 not reinstated, cured, and kept the loan current, had  
2 the regular monthly payments of \$24,307.45 not been based on interest at 6.5% and been  
3 applied to both principal and interest, had I been advised by BPB of the environmental issues  
4 with the Property, and had I been advised by BPB that it may attempt to assert any right to  
5 thereafter backdate and/or re-apply the monies already paid to it against alleged late fees,  
6 interest at \$8.5%, or other costs.

7 13. On July 13, 2011 I wrote correspondence to the Investors to update them in the status of  
8 their investment and to request additional monies to fund related expenditures. See Debtor's  
9 Trial Exhibit E. At the time I signed this July 13, 2011 correspondence I believed, based on  
10 my communications with Bruce Brown of BPB, the figures in PLM's Notice of Trustee's  
11 Sale, and the figures listed in PLM's reinstatement letter, that BPB was owed \$3,487,000.00  
12 plus \$386,00 as a reinstatement amount.

13 14. On July 15, 2011, prior to the sale date, BPB and IGL entered into an "Agreement Re  
14 Foreclosure Sale" (the "Foreclosure Agreement"). See Debtor's Trial Exhibit F. I negotiated  
15 the reinstatement and cure amount of \$380,661.90 directly with Bruce Brown of BPB. Under  
16 the Foreclosure Agreement BPB agreed that if IGL immediately paid \$380,661.90 to cure the  
17 arrearage BPB would postpone the trustee's sale to after August 17, 2011, and that if IGL  
18 made "the regular monthly payment of \$24,307.45 due under the Loan" to keep the loan  
19 current, then BPB would continuously postpone the trustee's sale through March 16, 2012.  
20 The Foreclosure Agreement also provided that the \$380,661.90 sum shall be applied to  
21 payments of principal and interest now due, together with certain trustee's fees, attorneys'  
22 fees and other costs owing to Borel as of the date of this Agreement . . .". The Foreclosure  
23 Agreement acknowledges the Second DOT and at all times related to the Foreclosure  
24 Agreement and thereafter BPB was aware of the Second DOT.

25 15. On July 18, 2001, pursuant to the Foreclosure Agreement, IGL paid BPB \$380,661.90  
26 to reinstate and bring the loan current.

27 16. The foreclosure sale on the Second DOT took place on October 24, 2011. At the sale  
28 the Investors bid \$100,000, which was the highest bid, and became the owners of the

1 Property. The sale resulted in a deficiency balance due on the IGL Loan of \$1,083,908.74.  
2 On October 27, 2011 I signed on behalf of IGL as trustee a Trustee's Deed. BPB was  
3 promptly made aware of the foreclosure on the Second DOT. The Trustee's Deed was  
4 recorded with the Santa Clara County Recorder on April 20, 2012 as Document#21633290).  
5 See Debtor's Trial Exhibit J.

6 17. At the time of the foreclosure, the building was empty, there was no tenant, and there  
7 was no rental income. On October 24, 2011 I wrote correspondence to the Investors to update  
8 them in the status of their investment. See Debtor's Trial Exhibit I. At the time I signed this  
9 October 24, 2011 correspondence IGL and Debtor would not have foreclosed on its Second  
10 DOT, entered into the Foreclosure Agreement or subsequent amendments, paid the agreed  
11 reinstatement and cure monies of \$380,661.90 to bring the loan current, or paid the regular  
12 monthly payments of \$24,307.45 to keep the loan current had the principal balance not been  
13 \$3,487,501.16, had the payment of \$380,661.90 and the regular monthly payment of  
14 \$24,307.45 not cured, reinstated, and kept the loan current, had the regular monthly payments  
15 of \$24,307.45 not been based on interest at 6.5% and been applied to both principal and  
16 interest, had I been advised by BPB of the environmental issues with the Property, and had I  
17 been advised by BPB that it may attempt to assert any right to thereafter backdate and/or re-  
18 apply the monies already paid to it against alleged late fees, interest at 8.5%, or other costs.

19 18. Between October 2011 and March 2012, the Investors marketed the Property for lease  
20 to potential tenants, found a tenant in March 2012, and eventually paid \$242,000 in leasing  
21 commissions. At the same time IGL was paying BPB its regularly monthly payment of  
22 \$24,307.45 per month to keep the loan current.

1 19. In January 2012, IGL and BPB entered into a “Second Amendment to Agreement Re  
2 Foreclosure Sale” (the “Second Amendment”). See Debtor’s Trial Exhibit K. I recall there  
3 was a First Amendment Re Foreclosure Sale, as such is referenced in other documents, but  
4 believe it may not have been fully signed. Under the Second Amendment the parties agreed  
5 that if IGL made “the regular monthly payments” for December 2011 through March 2012 of  
6 \$24,307.45 to keep the loan current then BPB would postpone the foreclosure sale, and if the  
7 Investors wanted to pay off the First DOT, BPB would accept \$3.25 million dollars, less the  
8 payments made for those months, in full satisfaction of the First DOT. The plan was to have  
9 the Property leased and sold by March 2012 in order to pay off the First DOT. I negotiated  
10 these amendments directly with Bruce Brown of BPB.

11 20. In March 2012, the Investors formed 272 E Santa Clara Grocery, LLC (“Debtor”) and  
12 by way of a Grant Deed deeded their respective ownership interests in the Property to the  
13 Debtor. The deed was recorded in April 2012. BPB was promptly made aware of the transfer  
14 of such interest to the Debtor (and such is reflected in the Fourth Amendment discussed  
15 hereinafter).

16 21. On or about March 8, 2012, Debtor, as landlord, entered into a 10-year lease for the  
17 Property with Grocery Outlet, Inc., a national grocery store chain. During the first few years  
18 the tenant pays rent of \$39,600 per month. The monthly rent was net of all expenses,  
19 including property taxes, insurance, and maintenance (except the roof and structure) which  
20 are all paid by the tenant. See Debtor’s Trial Exhibit M and P.

21 22. In March 2012, BPB, IGL, and Debtor entered into a “Third Amendment to Agreement  
22 Re Foreclosure Sale” (the “Third Amendment”). See Debtor’s Trial Exhibit N. I negotiated  
23 the Third Amendment with Bruce Brown on behalf of BPB. Under the Third Amendment,  
24 the parties agreed that if BPB was paid “the regular monthly payment of \$24,307.45 due  
25 under the Loan” to keep the loan current then BPB would postpone the trustee’s sale through  
26 December 31, 2012.

27 23. The Third Amendment provides, in pertinent part, as follows:

28 “Recital C. As of the date of this Third Amendment, the principal sum due under



1 the Loan is \$3,460,917.00."

2 "1. Acknowledgment of Recitals. The Parties acknowledge the truth and  
3 accuracy of the Recitals to this Third Amendment."

4 25. At the time I executed the Third Amendment the principal figure of \$3,460,917.00  
5 appeared consistent with the information available to IGL, Debtor, and me, my  
6 communications with Bruce Brown of BPB, PLM's Notice of Trustee's Sale, amortization of  
7 the BPB Loan at 6.5%, and proper allocation of the prior payments to interest and principal.

8 26. The Third Amendment also provided that Debtor and BPB would enter into a  
9 Subordination, Non-Disturbance and Attornment Agreement ("SNDA") under which BPB  
10 would not disturb the tenant's possession in the event BPB foreclosed, which SNDA was  
11 signed on July 26, 2012. See Debtor's Trial Exhibit S.

12 27. In reliance upon the multiple agreements with BPB, Debtor continued to pay BPB  
13 \$24,307.45 per month through and including March 2013 to keep the loan current. Thus,  
14 from July 2011 through March 2013, Debtor paid Plaintiff \$380,661.90 to cure the arrearage  
15 and bring the loan current, plus approximately \$413,219 in monthly payments for a total of  
16 \$793,880.90 to keep the loan current. This is in addition to the approximate \$242,000 for  
17 leasing commissions spent to find a tenant. Thus, a total of approximately \$1,035,880 was  
18 spent in reliance upon the agreements with BPB.

19 28. IGL and Debtor would not have foreclosed on its Second DOT, entered into the  
20 Foreclosure Agreement or subsequent amendments, paid the agreed reinstatement and cure  
21 monies of \$380,661.90 to bring the loan current, or paid the regular monthly payments of  
22 \$24,307.45 to keep the loan current had the principal balance not been \$3,487,501.16, had  
23 the payment of \$380,661.90 and the regular monthly payment of \$24,307.45 not cured,  
24 reinstated, and kept the loan current, had the regular monthly payments of \$24,307.45 not  
25 been based on interest at 6.5% and been applied to both principal and interest, had I been  
26 advised by BPB of the environmental issues with the Property, and had I been advised by  
27 BPB that it may attempt to assert any right to thereafter backdate and/or re-apply the monies  
28 already paid to it against alleged late fees, interest at 8.5%, or other costs.



1 29. In November 2012, Debtor found a buyer and entered into a contract for the sale of the  
2 Property for \$7.3 million dollars. The escrow was scheduled to close in December 2012. This  
3 sale would have paid off BPB's lien. However, during their due diligence, the buyer  
4 discovered that the Property was listed with the State and/or County as undergoing clean-up  
5 or investigation due to a possible leak from an old underground storage tank. Specifically,  
6 while conducting a Phase I, Environmental Investigation, the buyer discovered the existence  
7 of prior reports filed showing that the Property was contaminated. As a result of the  
8 discovery, the buyer cancelled the sale.

9 30. This discovery by the buyer was the first notice that Debtor had of any  
10 contamination on the Property. However, Debtor was informed that BPB had been aware of  
11 the contamination since 2008, had a copy of a report showing purported contamination, and  
12 never disclosed the report or the purported contamination to Debtor. Had BPB disclosed this  
13 information to Debtor, Debtor would not have paid BPB \$793,880 to cure the default, made  
14 the regular monthly payments under the First DOT to keep the loan current, or invested  
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1 another \$242,000 in leasing commissions to find a tenant. In addition, had BPB disclosed this  
2 information, not affirmatively acknowledged the declining principal (\$3,460,917.00 in the  
3 Third Agreement), not reinstated or treated the loan as current, not based the regular monthly  
4 payment of \$24,307.45 on 6.5% and applied such payments to interest and principal, or  
5 asserted any right to thereafter backdate and/or re-apply the monies already paid to it against  
6 alleged late fees, interest at 8.5%, or other costs then IGL and Debtor would not have  
7 entered into the Foreclosure Agreement or taken any of the actions described herein.

8 31. In late January or early February 2013 and at my direction my staff contacted BPB  
9 because Debtor needed payment information for its tax returns and had not received a 1098  
10 or similar form from BPB. On February 4, 2013 Debtor received a facsimile from BPB  
11 consisting of a payment history on the loan. The payment history reflects a payment history  
12 for 12/27/11 through 12/31/12, a principal balance of \$3,460,916.67, regular monthly  
13 payments of \$24,307.45, but an allocation of the payment only to interest and at 8%. See  
14 Debtor's Trial Exhibit T.

15 32. I discussed the errors in this payment history with Tom Rancatore. Therefore, I  
16 contacted Bruce Brown of BPB, indicated that the payment history was incorrect in terms of  
17 the interest rate and application of the regular monthly payment to interest and principal, and  
18 asked that the errors be corrected immediately and made consistent with our agreement that  
19 the loan was brought current and kept current by the prior payments so Debtor could prepare  
20 its tax returns. Mr. Brown agreed to correct the errors.

21 33. On February 25, 2013 Bruce Brown emailed an adjusted amortization schedule which  
22 referenced the loan, the payment history from July 19, 2011 through February 15, 2013, the  
23 interest rate at 6.5%, the regular monthly payment of \$24,307.45, the application of the  
24 regular monthly payment to principal and interest at 6.5%, a declining principal balance, and  
25 a principal balance of \$3,347,194.03. See Debtor's Trial Exhibit U. I reviewed this  
26 document with Mr. Rancatore at or about the time it was received from BPB. The email and  
27 revised payment history were received and reviewed by IGL, Debtor, and me at or about the  
28 time it was received and was dated and immediately placed in Debtor's files, books, and

1 records in the normal course of business.

2 34. No further action was required because the revised payment history was consistent with  
3 Debtor's files, books, and records regarding the amounts paid to BPB on the BPB Loan,  
4 including the amount of interest paid to BPB on the BPB during 2012 and the outstanding  
5 principal balance of the BPB Loan; consistent with the information available to IGL, Debtor,  
6 and me; consistent with my communications with Bruce Brown of BPB; consistent with  
7 PLM's Notice of Trustee's Sale; consistent with the stated principal amount owing as listed  
8 in the Third Amendment; and amortization of the BPB Loan at 6.5% with allocation of the  
9 prior payments to interest and principal.

10 35. The revised payment history (Debtor's Trial Exhibit U) appears to track the amounts  
11 owing relative to the payments made after the July 2011 payment of \$380,661.90 and  
12 between July 15, 2011 and February 15, 2013, as represented in the PLM's reinstatement  
13 letter (Debtor's Exhibit D), as represented in the Notice of Trustee's Sale (Debtor's Trial  
14 Exhibit C), as represented and agreed in the Third Amendment (Debtor's Trial Exhibit N),  
15 and amortization of the BPB Loan at 6.5% with allocation of the prior payments to interest  
16 and principal.

17 36. Debtor secured this amortization schedule from BPB for its 2012 taxes, reasonably  
18 relied upon this information, and used this information for its 2012 tax return which was  
19 prepared by Mr. Rancatore and approved and signed by me. See Debtor's Trial Exhibit V.

20 37. Debtor continued to make the monthly payments of \$24,307.45 to BPB through March  
21 2013 to keep the loan current. Around that time, BPB, IGL and Debtor negotiated the terms  
22 for a fourth amendment regarding the foreclosure sale. Under the terms as negotiated,  
23 Plaintiff agreed that so long as Debtor and IGL took certain steps to obtain a "closure and/or  
24 no further action letter" regarding the contamination from the required regulatory agency,  
25 and to the extent required, pay for any additional environmental investigation, testing,  
26 remediation and/or other work, kept BPB apprised of the progress, and obtained a "closure  
27 and/or no further action letter" resolving all environmental issues no later than April 30,  
28 2014, then no monthly payments after March 2013 would be due, and the foreclosure sale

1 would be continued through April 30, 2014. I negotiated this amendments directly with  
2 Bruce Brown of BPB.

3 38. In reliance upon the agreement that no payments were due after March 2013, Debtor did  
4 not make payments pending the drafting and execution of the fourth amendment. The draft  
5 fourth amendment was not received until May 2013. Consistent with the negotiations, the  
6 draft fourth amendment stated that no payments would be due after March 2013. However,  
7 contrary to prior discussions, the proposed "Fourth Amendment to Agreement Re  
8 Foreclosure Sale" (the "Fourth Amendment"), required Debtor, IGL, and their predecessors  
9 to release BPB from any claims relating to the Property including any environmental issues.  
10 See Debtor's Trial Exhibit X.

11 39. As BPB had failed to disclose the environmental contamination to Debtor prior to and  
12 during its dealings and did not know the severity of the contamination and cost of  
13 remediation, Debtor refused to execute the Fourth Amendment.

14 40. The Fourth Amendment, prepared by BPB and presented to IGL, Debtor, and me for  
15 signature, indicated as follows:

16 "Recital C. As of the date of this Fourth Amendment, the principal sum due  
17 under the Loan is \$3,341,017.00

18 "1. Acknowledgment of Recitals. The Parties acknowledge the truth and  
19 accuracy of the Recitals to this Fourth Amendment."

20 41. On April 9, 2013 I wrote correspondence to the Investors to update them in the status of  
21 their investment. See Debtor's Trial Exhibit W. At the time I signed this April 9, 2013  
22 correspondence I believed that BPB was owed approximately \$3,400,000.00 and BPB was  
23 being kept current by the regular monthly payments of \$24,307.45 as indicated in the letter  
24 based on my communications with Bruce Brown of BPB, the figures in PLM's Notice of  
25 Trustee's Sale, the figures listed in PLM's reinstatement letter, the figure in the Third  
26 Amendment, the revised payment history (Debtor's Trial Exhibit U), the figure in the Fourth  
27 Amendment (Debtor's Trial Exhibit X), and amortization of the BPB Loan at 6.5% with  
28 allocation of the prior payments to interest and principal.

1 42. On or about May 17, 2013 BPB served a "Demand That You Pay Rent To A Party  
2 Other Than The Landlord" on the tenant. See Debtor's Trial Exhibit Y. Debtor received  
3 confirmation that the tenant would comply with the demand and pay all rents directly to BPB.  
4 In compliance with the demand and commencing June 2013, BPB received and continues to  
5 receive all the rent, i.e. \$39,600, directly from the tenant (this rent was about \$15,300 more  
6 than the regular monthly payment). Pre-petition Debtor tendered, and continued to tender,  
7 immediate payment of the total arrearage, thereby bringing and maintaining the loan current.  
8 BPB wrongfully rejected this tender.

9 43. On June 10, 2013, BPB filed a Verified Complaint For (1) Judicial Foreclosure; And (2)  
10 Specific Performance And Appointment of Receiver commencing a state court action against  
11 Kimomex and Debtor, Santa Clara County Superior Action No.: 1-13-CV-247961 ("State  
12 Court Action") and wherein BPB, under penalty of perjury, repeatedly asserted "As of June  
13 10, 2013, there is due, owing and outstanding under the Promissory Note the principal  
14 amount of \$3,341,017.20 . . ." (sic). See Debtor's Trial Exhibit Z. Although the State Court  
15 Action does not acknowledge the prior agreements and prior payments, it does not assert or  
16 quantify any claim for default interest. This principal figure appeared consistent with the  
17 information provided to us by BPB and the agreements with BPB and Debtor and I  
18 reasonably relied upon this information. BPB also moved for appointment of a receiver in the  
19 State Court Action and in this regard file a Memorandum of Points and Authorities and the  
20 Declaration of David Scheiber both of which specifically state "As of June 10, 2013, the  
21 outstanding principal balance due and owing from Kimomex under the Promissory Note and  
22 other Loan Documents is \$3,341,017.20". See Debtor's Trial Exhibits AA and BB  
23 respectively and Debtor's Trial Exhibit BB page 3, paragraph 8, lines 24-25.

24 44. On June 27, 2013, Debtor commenced this Chapter 11 bankruptcy case ("Bankruptcy  
25 Case"). The bankruptcy was filed to avoid the unnecessary and expensive appointment of a  
26 receiver, to prevent BPB's pending foreclosure, and protect Debtor's substantial investment  
27 and substantial equity.

28 45. With the assistance of Mr. Rancatore and at my direction Debtor prepared its various

1 bankruptcy schedules based on the files, books, and records of IGL and Debtor. Based on  
2 this information Debtor' Schedule D (Debtor's Trial Exhibit CC) listed the outstanding  
3 balance owed to BPB pursuant to the First DOT at \$3,360,000.00, Debtor's July 2013  
4 Monthly Operating Report (Debtor's Trial Exhibit DD) listed the outstanding balance owed  
5 to BPB pursuant to the First DOT at \$3,360,000.00 (this total excludes the estimated secured  
6 property taxes owing of \$210,000.00), and Debtor's Amended Schedule D (Debtor's Trial  
7 Exhibit EE) listed the outstanding balance owed to BPB pursuant to the First DOT at  
8 \$3,360,000.00. See Debtor's Trial Exhibits CC, DD, and EE.

9 46. With the assistance of Mr. Rancatore and at my direction and based on IGL's  
10 and Debtor's files, books, and records, Debtor prepared and provided the United States  
11 Trustee with a Balance Sheet as of June 27, 2013 which listed the outstanding balance owed  
12 to BPB pursuant to the First DOT at \$3,359,448.01. See Debtor's Trial Exhibit FF.

13 47. In July 2013 with the assistance of Mr. Rancatore and at my direction and based  
14 on Debtor's files, books, and records, prepared and provided the United States Trustee with a  
15 Profit & Loss statement for January 1, 2013 through June 27, 2013 which listed the interest  
16 paid or payable to BPB on the BPB Loan at \$72,922.35 for the five months of 2013. The  
17 interest figure was based on Debtor's files, books, and records, including the revised  
18 payment history, regular monthly payments of \$24,307.45, a 6.5% rate, and the information  
19 BPB provided to IGL and Debtor. See Debtor's Trial Exhibit GG.

20 48. In February 2013 with the assistance of Mr. Rancatore and at my direction and  
21 based on Debtor's files, books, and records, Debtor prepared a Balance Sheet as of  
22 December 31, 2012. The Balance Sheet and listed the outstanding balance owed to BPB  
23 pursuant to the First DOT at \$3,359,448.01 and was based on Debtor's files, books, and  
24 records, including the revised payment history, regular monthly payments of \$24,307.45, a  
25 6.5% rate, and the information BPB provided to IGL and Debtor. See Debtor's Trial Exhibit  
26 XX.

27 49. In February 2013 with the assistance of Mr. Rancatore and at my direction and  
28 based on Debtor's files, books, and records, Debtor prepared a Profit & Loss statement for

1 2012. The statement listed the amount of interest paid to BPB on the BPB Loan at  
2 \$214,528.19 and was based on Debtor's files, books, and records, including the revised  
3 payment history, regular monthly payments of \$24,307.45, a 6.5% rate, and the information  
4 BPB provided to IGL and Debtor. See Debtor's Trial Exhibit YY.

5 50. On September 24, 2013, Debtor filed a disclosure statement and plan with a hearing  
6 date of November 7, 2013 (Doc#62). On October 7, 2013, the court issued an Order Denying  
7 Motion for Order Confirming No Stay with Respect to Rent and Denying Cross-Motion for  
8 Use of Cash Collateral (Doc#64).

9 51. On October 7, 2013, this court issued an Order Denying Motion for Order Confirming  
10 No Stay with Respect to Rent and Denying Cross-Motion for Use of Cash Collateral  
11 ("Order")(Doc#64) which, in summary confirmed Debtor's position that the post-petition  
12 rental income was property of the estate pursuant to Bankruptcy Code 541 and cash collateral  
13 of BPB and may not be used by Debtor absent consent of BPB or order of the court.

14 52. Through counsel and at my direction Debtor attempted to secure an agreement with  
15 BPB regarding the use of cash collateral, prior to and after this court's Order, but BPB  
16 refused to consent<sup>1</sup> to Debtor using such funds to pay BPB its contractual interest and regular  
17 monthly payment of \$24,307.45 for the post-petition months of July-October and thereafter  
18 as monthly rental income of \$39,600 was received from Debtor's tenant, to pay United States  
19 Trustee Quarterly Fees as invoiced by the United States Trustee ("UST"), and to hold the  
20 balance of such funds in Debtor's DIP account pending an agreement with BPB and/or an  
21 order from this court and without prejudice to the rights of BPB or Debtor. See Debtor's  
22 Trial Exhibit OO.

23 53. On July 12, 2013, BPB, through David Scheiber, Senior Vice President- Special Assets  
24 Department of BPB, filed a declaration, under penalty of perjury, and asserted that the  
25 outstanding balance due and owing by Debtor to BPB on the First DOT as of June 27, 2013  
26 totaled \$3,341,017.20. ("Scheiber Declaration")(Docket#22-2, entered July 12, 2013, page 3,  
27

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28 <sup>1</sup>BPB orally refused to consent to the use of such funds and then refused to consent to use of  
such funds in writing (twice).



1 paragraph 7). See Debtor's Trial Exhibit HH. Specifically, BPB asserted "As of June 27,  
2 2013, the outstanding principal balance due and owing from Kimomex under the Promissory  
3 Note and other Loan Documents is \$3,341,017.20." This principal figure appeared consistent  
4 with the information provided to us by BPB and the agreements with BPB and Debtor and I  
5 reasonably relied upon this information.

6 54. On July 30, 2013 BPB filed a Reply in Support of its Ex Parte Applications for Orders  
7 of Examination and for Production of Documents Pursuant to Bankruptcy Rule 2004, in  
8 support of numerous 2004 applications (Docket#31-36 and 41) asserting "BPB holds the  
9 senior lien on the Property securing a loan with an outstanding principal balance of  
10 \$3,341,017.20". (Docket#42, entered July 30, 2013, page 3, lines 7-8). See Debtor's Trial  
11 Exhibit II. At the same time BPB also re-filed the Scheiber Declaration to support the alleged  
12 principal balance of \$3,341,017.20. (Docket#31-3, entered July 30, 2013, page 3, paragraph  
13 7). See Debtor's Trial Exhibit JJ. This principal figure appeared consistent with the  
14 information provided to us by BPB and the agreements with BPB and Debtor and I  
15 reasonably relied upon this information.

16 55. On August 12, 2013 BPB filed an additional 2004 application and asserted "BPB holds  
17 the senior lien on the Property securing a loan with an outstanding principal balance of  
18 \$3,341,017.20. (Counsel Decl. Exh. 1 ("Scheiber Declaration"), at ¶7.)" (Docket#45, page 2,  
19 paragraph 3). See Debtor's Trial Exhibit JJ. This principal figure appeared consistent with  
20 the information provided to us by BPB and the agreements with BPB and Debtor and I  
21 reasonably relied upon this information.

22 56. On August 14, 2013 BPB filed Secured Creditor Boston Private Bank & Trust  
23 Company's Opposition to Debtor's Cross Motion for Use of Cash Collateral and asserted  
24 "As of the Petition Date, the outstanding principal balance due and owing from Kimomex to  
25 BPB under the Note and other Loan Documents was \$3,341,017.20." (Docket#50, page 4,  
26 lines 6-9). See Debtor's Trial Exhibit KK. This principal figure appeared consistent with the  
27 information provided to us by BPB and the agreements with BPB and Debtor and I  
28 reasonably relied upon this information.

1 57. On October 15, 2013 BPB filed a Declaration of Counsel In Support of Opposition to  
2 Ex Parte Application For Order Directing Boston Private Bank & Trust Company's  
3 Production of Documents Under Bankruptcy Rule 2004 and asserted "BPB holds the senior  
4 lien on the certain leased real property located at 272 E. Santa Clara Street, San Jose, Ca. (the  
5 "Property") securing a loan with an outstanding principal balance of \$3,341,017.20".  
6 (Docket#51, page 5, lines 3-5). See Debtor's Trial Exhibit LL. This principal figure appeared  
7 consistent with the information provided to us by BPB and the agreements with BPB and  
8 Debtor and I reasonably relied upon this information.

9 58. BPB consistently provided Debtor with confirmation of the principal amount owed  
10 under the loan and First DOT and how much it would cost to bring and keep the loan current  
11 and Debtor and I reasonably relied upon this representations. Debtor would not have pursued  
12 foreclosure of its Second DOT, the various agreements with BPB, secured a tenant, or paid  
13 BPB and various related expenses totaling approximately \$1,035,880 (\$380,661.90 to BPB to  
14 cure and reinstate the loan, \$242,000 in leasing commissions, and \$413,219 to BPB  
15 (\$24,307.45 from July 2011-March 2013) for regular monthly payments of principal and  
16 interest to keep the loan current if the principal, interest, and interest rate were not as agreed  
17 with BPB or as represented by BPB. Debtor rightfully relied upon BPB's representations of  
18 principal, interest, and interest rate as discussed herein and as reflected in the Notice of  
19 Trustee's Sale, the June 2011 reinstatement letter (principal \$3,487,501.16), in the March  
20 2012 BPB Third Amendment (principal \$3,460,917.00), its February 2013 Amortization  
21 Schedule (principal \$3,347,194.03), in the May 2013 Fourth Amendment (principal  
22 \$3,341,017.00), and various other documents.

23 59. Yet, just as Debtor proceeded to sell the Property BPB filed the BPB Claim and  
24 asserted, contrary to all prior declarations and documents, that "As of the petition date, the  
25 outstanding principal due and owing from Kimomex under the Promissory Note and other  
26 Loan Documents is \$3,555,168.55" (Proof of Claim No. 2, page 5). Suddenly, as Debtor  
27 moves to sell the Property, a \$214,151.35 (\$3,555,168.55-\$3,341,017.00) difference in the  
28 claimed principal arises and said difference is reflected between BPB's agreements with

1 Debtor, documents BPB provided Debtor, the Verified Complaint in the State Court Action,  
2 and repeatedly filed declarations and representations made in this bankruptcy case on the one  
3 hand and the BPB Claim on the other hand.

4 60. The BPB Claim asserts a demand for \$3,806,600.52 as of October 15, 2013 and  
5 falsely asserts such demand consists of claims for \$3,555,168.55 in principal, default interest  
6 of \$217,401.61, late fees of \$34,030.36, and attorney's fees and costs. The demand is wrong.  
7 Debtor does not owe the inflated principal of amount of \$214,151.30 (\$3,555,168.55-  
8 \$3,341,017.20). Debtor does not owe interest except as indicated below. Debtor does not owe  
9 default interest of any kind. Debtor does not owe late fees of any kind. Debtor does not owe  
10 attorney's fees. The demand is falsely premised on BPB's unilateral reversing a payment of  
11 \$380,661 made in July 2011 to cure and reinstate the loan and payments of \$413,219  
12 (\$24,307.45 from July 2011-March 2013) made to keep the loan current and then reapplying  
13 them but only after belatedly creating a default date of May 2009, reapplying them at a  
14 increased rate of 8.5% from 6.5%, reapplying them so the payments were not made against  
15 principal and interest, and reapplying them as if they were late. The demand is falsely  
16 premised on BPB's attempt to nullify all of these payments, reverse and reapply all 2 1/4  
17 years of payments based on a backdated default date of May 2009, backdate the interest rate  
18 from 6.5 % to the default rate of 8.5%, charge late fees to the backdated payments  
19 notwithstanding no payments were ever late, and do so without notice to Debtor. In addition,  
20 the demand unilaterally ignores BPB's agreement not to require payments in April 2013 and  
21 May 2013, ignores BPB's refusal to accept payments of \$24,307.45 (principal and interest)  
22 from July 2013-October 2013 when BPB intercepted the rent payments from Debtor's tenant,  
23 and ignore Debtor's payment of \$3,341,017.20 on November 8, 2013.

24 The demand is fatally flawed and inconsistent with the representations of Bruce  
25 Brown of BPB that we needed to pay \$380,661 in July 2011 to cure the loan and \$24,307.45  
26 to keep the loan current, inconsistent with the agreement negotiated with Bruce Brown of  
27 BPB, the agreements with BPB, and BPB's repeated, sworn, and represented statements of  
28 the amount owed.

1 As of March 2013 the loan was current and a total of \$3,341,017.20 was owed,  
2 without outstanding interest, default interest, late fees, or attorney's fees. Debtor paid the  
3 \$3,341,017.20 in principal on November 8, 2013. As of November 8, 2013 the only possible  
4 outstanding interest owed on the BPB Loan was interest for the months of June 2013-  
5 October 2013 because BPB intercepted the rent payments from Debtor's tenant (all \$39,600  
6 and not just the \$24,307.45). BPB refused Debtor's efforts to pay it \$24,307.45 for the  
7 months of the months of June 2013-October 2013 which would have reduced the principal by  
8 approximately \$6,143.54/month and paid interest of approximately \$18,163.91/month (using  
9 amortization figures as of 2/15/14 in Debtor's Trial Exhibit U-the revised payment history  
10 from BPB). Therefore, Debtor estimates that BPB may be owed interest of no more than  
11 approximately \$90,819.55 ( $\$18,163.91 \times 5$  (June 2013-October 2013)). Had BPB accepted  
12 payments from Debtor or made that demand at escrow, it would have been paid as rent was  
13 received and/or at escrow. BPB would not have incurred any attorney's fees had it honored  
14 the representations of Bruce Brown, the agreement negotiated with Bruce Brown, the  
15 agreements with BPB, and BPB's repeated, sworn, and represented statements of the amount  
16 owed.

17 61. On November 8, 2013 Debtor, pursuant to the court's October 30, 2013 Order  
18 Granting Motion to Sell Real Property (272 E. Santa Clara St.) Free and Clear of Liens and  
19 Pay Broker/agent (Docket#89) (See Debtor's Trial Exhibit RR), paid BPB \$3,341,017.20 in  
20 principal (See Debtor's Trial Exhibits QQ and RR). BPB has not amended the BPB Claim to  
21 acknowledge such principal payment.

22 62. The BPB Claim was, admittedly, backdated. Debtor rejects the explanation for the  
23 backdating as "based on a proper allocation of prior payments" as alleged therein. Debtor  
24 submits that BPB, in an effort to improperly maximize its recovery, backdated its  
25 calculations.

26 63. BPB failed to put Debtor on notice of its intention to accelerate the note and seek  
27 default interest. In fact, BPB did the opposite.

28 64. BPB was aware of Debtor's junior deed of trust on the Property and did not assert any

1 objection relative thereto, negotiated and entered into various agreements with Debtor  
2 wherein BPB specified the amounts necessary to cure arrears and reinstate the loan and keep  
3 the loan current and accepted these payments from Debtor over the course of approximately  
4 two years without objection, was aware of Debtor's foreclosure on its junior deed of trust on  
5 the Property and did not assert any objection relative thereto, was aware of Debtor's efforts  
6 to ready the Property to secure a tenant and that it had secured a tenant and did not assert any  
7 objections relative thereto, was aware of Debtor's efforts to market and sell the Property and  
8 of its December 2012 sale and did not assert any objection relative thereto, continued to  
9 accept regular monthly payments from Debtor without objection or reservation, and at no  
10 time prior to the commencement of this case did BPB ever assert, mention, reference, or  
11 claim default interest.

12  
13 65. In reliance thereon, Debtor foreclosed on its junior deed of trust, paid substantial  
14 monies to BPB to cure its arrears and reinstate the loan, paid substantial monies to BPB to  
15 maintain its regular monthly contractual payment, paid substantial monies to others to ready  
16 the Property for a tenant and to secure a tenant, and marketed the Property for sale and  
17 secured a buyer-only to have the sale fall through due to BPB's non-disclosure of the  
18 environmental issue. Similarly, BPB consistently provided Debtor with confirmation of the  
19 declining principal amount owed under the loan and First DOT upon which Debtor  
20 reasonably relied. Debtor would not have pursued foreclosure of its Second DOT, the various  
21 agreements with BPB, secured a tenant, or paid BPB and various related expenses totaling  
22 approximately \$1,035,880 (\$380,661.90 to BPB to cure and reinstate, \$242,000 in leasing  
23 commissions, and \$413,219 to BPB (\$24,307.45 from July 2011-March 2013) for regular  
24 monthly payments of principal and interest to keep the loan current if the principal was not as  
25 represented by BPB, the regular monthly payment of \$24,307.45 was not being applied to  
26 principal and interest at 6.5%, or had I been advised by BPB that it may attempt to assert any  
27 right to thereafter backdate and/or re-apply the monies already paid to it against alleged late  
28 fees, interest at \$8.5%, or other costs. Debtor rightfully and reasonably relied upon BPB's

1 representations of principal and interest including as reflected in its June 2011 reinstatement  
2 letter (principal \$3,487,501.16), the March 2012 BPB Third Amendment (principal  
3 \$3,460,917.00), its February 2013 Amortization Schedule (principal \$3,347,194.03 and  
4 interest at 6.5%), and the March 2013 Fourth Amendment (principal \$3,341,017.00).

5 66. Debtor cured and reinstated the loan as agreed, kept the loan current, and all curable  
6 or other defaults were waived by BPB.

7 67. The BPB Claim improperly asserts late fees notwithstanding Debtor reinstated the  
8 loan and cured BPB's claimed monetary defaults in approximately July 2011 and caused  
9 timely regular monthly payments to be made thereafter and through present to keep the loan  
10 current, including those payments intercepted by BPB from Debtor's tenant and/or that which  
11 BPB refused to accept. The BPB Claim asserts late fees of \$1,215.37 a month from July 19,  
12 2011 to October 15, 2013 and totaling \$34,030.36 as of November 15, 2013. Yet, the same  
13 BPB Claim simultaneously asserts payments made from July 19, 2011 through March 15,  
14 2013, fails to acknowledge a March 2013 agreement between BPB and Debtor that monthly  
15 payments need not be made, fails to acknowledge that pre-petition BPB received the June  
16 2013 rent payment of \$39,600 following BPB's May 17, 2013 BPB Demand That You Pay  
17 Rent To A Party Other Than The Landlord, and fails to acknowledge that post-petition BPB  
18 intercepted \$39,600 for four consecutive months (July-October 2013) totaling \$158,400  
19 (\$39,600 x 4) and then refused to accept regular monthly contract payments of \$24,307.45  
20 from Debtor for the months of July-October 2013 and thereafter as Debtor's tenant paid its  
21 monthly rent. Debtor filed a Motion for Use of Cash Collateral because BPB refused to  
22 accept such payments.

23 68. BPB has no basis to charge Debtor late fees. As stated hereinabove, Debtor reinstated  
24 the loan, cured the non-monetary defaults, and kept the loan current as agreed, BPB received  
25 overpayments from Debtor's tenant or simply refused to accept payments, and Debtor only  
26 stopped making payments pursuant to a verbal agreement with BPB that no payments needed  
27 to be made until the environmental issue relative to the Property could be resolved (as  
28

1 referenced in the Fourth Amendment Re Foreclosure Sale) and then BPB intercepted, kept,  
2 and should have applied the April, May, and June 2013 \$39,600 each (\$118,800) and then  
3 wrongfully intercepted, held without applying payments against the loan, belatedly turned  
4 over to Debtor rents for July-October 2013, but then refused to accept payments for July-  
5 October and thereafter from Debtor at \$24,307.45 per month.

6  
7 69. In May 2013 I received correspondence from BPB which indicated, in part, "The  
8 relationship between the Bank, on the one hand, and Investment Grade Loans, Inc and 272 E.  
9 Santa Clara Grocery, LLC, on the other hand, remains governed by the provisions of the  
10 Third Amendment to Agreement Re Foreclosure Sale, which the parties executed in March  
11 2012." See Debtor's Trial Exhibit WW.

12 70. IGL, Debtor, and I were never asked to and never assumed the BPB Loan or First  
13 DOT.

14 I declare under penalty of perjury that the foregoing is true and correct and that this  
15 declaration was executed at Los Altos, California, on May 7, 2014.

16 /s/ Andrew A. Lewis  
17 Andrew A. Lewis  
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